STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 28, 2013

In the Matter of N. SCOBLE, Minor.

No. 313221
Kalamazoo Circuit Court
Family Division
LC No. 11-000380-NA

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court order terminating the parental rights of all putative fathers to the minor child. We affirm.

Respondent father argues that the trial court violated his due process right to be present at the termination hearing because the trial court dismissed him from the hearing. Whether a child protective proceeding complied with a person's right to due process is a question of constitutional law reviewed de novo. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

Here, the minor child's mother identified respondent father as the minor child's putative father at the November 28, 2011, preliminary examination. However, the mother also told the trial court that respondent father did not believe that he was the minor child's father and that respondent father had not taken any action to acknowledge paternity. At some point after April 13, 2012, respondent father wrote a letter to a case worker and requested a paternity test. However, respondent father was incarcerated at that time and the paternity clinic would not provide a testing kit without a court order. The trial court stated at the July 3, 2012, dispositional review hearing that it would not order the paternity clinic to provide paternity testing until respondent father filed a complaint for paternity. On July 10, 2012, the case worker wrote to respondent father explaining that he would have to file a complaint for paternity in order to obtain a paternity test. Respondent father did not do so. At the August 30, 2012, termination hearing, respondent father told the trial court that he did not know if the minor child was his child and indicated that he needed a DNA test. The trial court found that respondent father had not properly asserted his parental rights and excused him from the termination hearing. The trial court subsequently terminated the parental rights of all putative fathers, including respondent father.

A person may have a due process right to be present at a termination hearing under certain circumstances. *In re Vasquez*, 199 Mich App 44, 46-50; 501 NW2d 231 (1993).

However, respondent father was only a putative father under MCR 3.903(A)(24) and was never determined to be a legal father as defined in MCR 3.903(A)(7). "[A] putative father ordinarily has no rights regarding his biological child, including the right to notice of child protective proceedings, until he legally establishes that he is the child's father." *In re AMB*, 248 Mich App 144, 174; 640 NW2d 262 (2001).

Nevertheless, respondent father claims that he had a right to be present at the termination hearing under MCR 3.921(B)(3) and MCR 3.977(C)(1). However, both MCR 3.921(B)(3) and MCR 3.977(C)(1) refer to MCR 3.921(B)(2) to identify those persons who must receive *notice* of a termination hearing. Putative fathers are not among those persons listed. Rather, notice to putative fathers is governed by MCR 3.921(D)(1).[1] Our review of the record reveals that the trial court consistently provided reasonable notice to respondent father of each proceeding after the initial preliminary hearing as required by subrule (D)(1). The court also summoned respondent father to the termination hearing.

Respondent father also claims that the trial court prevented him from asserting his parental rights by failing to sua sponte order DNA testing even though respondent father took no action to assert his paternity. Respondent father offers no support for his argument and has waived this claim of error. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Respondent father also argues that the trial court did not have jurisdiction over him because the court did not properly serve notice of the proceedings under MCR 3.920(B). This unpreserved issue is reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Respondent father was not entitled to notice under MCR 3.920(B)(2)(b) because he was merely the minor child's putative father and was not a "parent" under MCR 3.903(A)(7). Even if the trial court had failed to give respondent father notice as provided within the court rules, the failure to follow the notice requirements within the court rules does not establish a jurisdictional defect. *In re Adair*, 191 Mich App 710, 714; 478 NW2d 667 (1991), citing *In re Brown*, 149 Mich App 529, 540-542; 386 NW2d 577 (1986). Thus, respondent father's argument that the trial court lacked jurisdiction over him because it failed to follow the notice requirements of the court rules is without merit. Respondent father fails to show plain error. *Utrera*, 281 Mich App at 8. Further, we note that there was no jurisdictional defect under MCL 712A.12 because trial court properly summoned respondent father to the termination hearing under MCL 712A.12.

[1] Respondent father's reliance on *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), for the proposition that, as an incarcerated party, he had the right to participate in each proceeding, is misplaced. *Mason* is factually distinguishable from the present case because the father in *Mason* was recognized as the legal father of the minor children. *Mason*, 486 Mich at 146-147.

Finally, respondent father argues that the trial court erred by failing to record and transcribe the December 29, 2011, pretrial hearing. This issue was not raised before, nor addressed or decided by, the trial court and is unpreserved. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). This unpreserved issue is reviewed for plain error affecting substantial rights. *Utrera*, 281 Mich App at 8.

Assuming without deciding that it was plain error for the trial court to fail to record and transcribe the December 29, 2011, pretrial hearing, respondent father must also show prejudice resulting from the missing transcript. *Id.* at 9. Respondent father suggests that the gap in the record created by the missing transcript is attributable to the trial court. However, where a transcript is unavailable, it is the appellant's responsibility to take steps to file a settled statement of facts with the trial court to serve as a substitute for the missing transcript under MCR 7.210(B)(2). Because respondent father did not take steps to file a settled statement of facts with the trial court under MCR 7.210(B)(2), the gap in the record created by the missing transcript is attributable to respondent father. Respondent father also argues that, "when the Trial Court makes such a significant blunder there should be a presumption of harm." This claim is waived because respondent father offers no authority to support that position. *Nat'l Waterworks, Inc*, 275 Mich App at 265. Moreover, we recognize that "before a court grants a new trial based upon a failure of the transcription process, it must determine that the existing record and any possible settlement or reconstruction of the record is insufficient to allow evaluation of the specific allegations of error." *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247, 250; 404 NW2d 233 (1987). In this case, the missing transcript from the December 29, 2011, pretrial hearing does not prevent our evaluation of respondent father's substantive allegations of error. Thus, any error related to the missing transcript does not entitle respondent father to new proceedings before the trial court. *Id.* Respondent father has failed to show prejudice. *Utrera*, 281 Mich App at 9.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell